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No. 98-97

In the Supreme Court of the United States

OCTOBER TERM, 1997

ELOISE ANDERSON, ET AL.,
Petitioners

v.

BRENDA ROE AND ANNA DOE,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA, AND THE STATES OF ALABAMA, COLORADO, FLORIDA, GEORGIA, ILLINOIS, MINNESOTA, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, RHODE ISLAND AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICI

The *amici* States, like California, are responsible for administering a variety of welfare programs within their respective jurisdictions. These include the cash and non-cash assistance programs authorized by the federally-funded Temporary Assistance to Needy Families (TANF) program.

Congress, when it created TANF as the successor to the former Aid to Families with Dependent Children (AFDC) program, expressly authorized the States to adopt durational residency rules of the kind enacted by California. These rules, unlike some which the Court has condemned in the past, do not deny cash welfare benefits to new residents, but temporarily key benefits to those which recipients would have received in their State of prior residence. Differences among the States in their cash benefit programs are thus neutralized as a factor in the decision whether to migrate from one State to another; and welfare recipients are encouraged to look to self-sufficiency, rather than a larger welfare grant, as the way to get ahead.

Some of the *amici*, in response to Congress' invitation, have enacted residency rules similar to California's, and have a substantial interest in the outcome of this case. All of the *amici* have an interest in encouraging state experimentation and innovation to attack the seemingly intractable problems of poverty, and especially in encouraging approaches which encourage self-support rather than continued dependency on the part of welfare recipients.

SUMMARY OF ARGUMENT

1. This case presents an important issue of federal law which has not been, but should be, reviewed by the Court. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Court held that the Constitution was violated by rules which denied welfare benefits altogether to new residents, because those rules penalized persons who exercised their right to interstate migration. The Court, however, has never addressed the constitutionality of rules, like the California rule in this case, which leave interstate migrants in the same position in which they would have been had they not migrated.

California's rule is neither isolated nor parochial. Rather, residency rules of this kind are an integral feature of the national effort at welfare reform which have been endorsed by Congress and adopted by many States. In light of *Shapiro*, however, they have been, and likely will continue to be, the subject of recurrent challenges until the Court resolves the issue of their legitimacy.

2. The current state of the law in this area is unsatisfactory. *Shapiro v. Thompson* and its progeny asserted a "right to travel," but, contrary to the Court's decisions in other areas, neither moored that right to a constitutional text nor anchored it in the traditions of the Nation. As a result, the contours of the "right to travel" have remained indeterminate, and lower courts have often expressed difficulty in applying *Shapiro* to new situations. The Court should review this case to provide a firmer doctrinal base for "right to travel" analysis.

ARGUMENT

I. THE CONSTITUTIONALITY OF RESIDENCY RULES LIKE CALIFORNIA'S, WHICH HAVE BEEN ENDORSED BY CONGRESS AND ADOPTED BY MANY STATES, PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, REVIEWED BY THE COURT.

Four years ago, in another case from California, the Court granted certiorari to resolve the issue now presented again by the petition in this case, but ultimately held that the case had become unripe and so did not reach the merits. *Anderson v. Green*, 513 U.S. 557 (1995). Since then, because of developments at the national level, the importance of this issue has only increased.

In 1996, Congress enacted a fundamental change in the Nation's welfare laws. Until that time, the federal government's primary vehicle for providing cash assistance to needy families was the Aid to Families with Dependent Children or "AFDC" program, formerly codified at 42 U.S.C. §§ 601 *et seq*. AFDC, established in 1935 as part of the Social Security Act, *King v. Smith*, 392 U.S. 309, 313 (1968), was an exercise in "cooperative federalism," largely administered by the States but financed by a combination of state and federal funds. *Id.*, at 316. AFDC was conceived as an entitlement program, in which recipients' eligibility for benefits, and the state and federal governments' financial commitment to pay for them, were essentially open-ended.

After decades of experience with AFDC, however, Congress concluded that "[t]here is little doubt that the current welfare system is a failure." H.R. Rep. No. 651, 104th Cong.,

2nd Sess. (1996), p. 3.

> The welfare system contradicts fundamental American values that ought to be encouraged and rewarded: work, family, personal responsibility, and self-sufficiency. Instead, the system subsidizes dysfunctional behavior.... [It] discourages work [and] encourages long-term dependency.

Id., p. 4. In Congress' view, the then-current welfare system also promoted out-of-wedlock childbearing and its attendant social pathologies, was associated with high crime rates, and — despite massive spending over the years — had not reduced the poverty rate, which had remained essentially unchanged since 1960. *Id.*, p. 3-5.

In the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (1996), Congress abolished AFDC, establishing in its stead a new program, known as Temporary Aid to Needy Families or "TANF," likewise codified at 42 U.S.C. §§ 601 *et seq.*, as amended. Of the many changes encompassed by this legislation, we mention here only a few that are relevant to this case.

First, TANF is not an open-ended entitlement program. The statute provides that it "shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part," 42 U.S.C. § 601(b). There is a lifetime limit of 60 months' eligibility for benefits, 42 U.S.C. § 608(a)(7), and after 24 months of benefits, recipients must be engaged in work. 42 U.S.C. § 602(a)(1)(A)(ii). Nor is the federal financial commitment an open-ended one, in which a State automatically gets money for each aid recipient. Rather, each

State gets a finite amount — essentially capped at 1994 levels at least through the year 2002, 42 U.S.C. § 603(a)(1)(B) — which it must then manage as it thinks best.[1]

Second, the statute "grants maximum State flexibility to show true compassion by helping those in need achieve the freedom of self-reliance." H.R. Rep. No. 651, 104th Cong., 2nd Sess. (1996), p. 3. Thus, the federal funds allotted under TANF are block grants which each State has great discretion to manage; TANF money may be used not just for cash assistance to eligible families, but for a variety of other programs such as education, job training, and child care. 42 U.S.C. § 604(a) (States may use grants "in any manner that is reasonably calculated to accomplish the purpose of this [act]").

Congress was concerned, however, that in exercising their discretion under the new legislation, "States that want to pay higher benefits ... not be deterred from doing so by the fear that they will attract large numbers of recipients from bordering States." H.R. Rep. No. 651, 104th Cong., 2nd Sess. (1996), p. 1337. Congress knew that the Court, in *Shapiro v. Thompson*, 394 U.S. 618 (1969), had invalidated laws which attempted to deal with this problem by denying benefits altogether to new residents, but knew also that the Court "ha[d] not ruled on the question of paying *lower* amounts of aid for incoming residents." H.R. Rep. No. 651, 104th Cong., 2nd Sess. (1996), p. 1337 (emphasis added); H.R. Conf. Rep. No. 725, 104th Cong., 2nd Sess. (1996), p. 272-73 (same).

Congress therefore adopted a more nuanced approach

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[1]Each State must continue its funding at least at 80% of 1994 levels. 42 U.S.C. § 609(a)(7).

than that condemned in *Shapiro*, and provided that States

> may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months.

42 U.S.C. § 604(c); *see* 42 U.S.C. § 602(a)(1)(B)(i) (State plan to indicate whether State intends to treat families moving into the State differently from other families, and if so, how).

In response to Congress' authorization, at least eleven other States have adopted residency rules similar to California's.[2] These rules, like California's, do not deny welfare benefits to new residents, but they do temporarily key those benefits to what the recipient would have received in the State of prior residence. They thus make welfare benefits a neutral factor in the decision whether to migrate from one State to another, and encourage recipients to look to work, rather than a larger welfare grant, as the way to get ahead.

Some States are already defending these rules against

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[2]*See* Ga. Code § 49-4-187; Ill. Ann. Stat. ch. 305, para. 5/11-30 (Smith-Hurd); Md. Regs. Code § 07.03.03.12E; Minn. Stat. Ann. § 256J.43; N.J. Stat. Ann. § 44:10-46; N.Y. Soc. Serv. Law § 117.3 (McKinney); N.D. Cent. Code § 50-09-29(*l*); Pa. Stat. Ann. tit. 62, § 432(5)(ii) (Purdon); Wash. Rev. Code Ann. § 74.08.025(c)(2). *See also* Fla. Stat. Ann. tit. 30, § 414.105(6) (for first 12 months, time limit on receipt of benefits is Florida limit or limit of State of prior residence, whichever is shorter); R.I. Gen. Laws § 40--5.1-8(e) (30% reduction in amount of cash benefits until 12 months consecutive residence).

claims that they are inconsistent with *Shapiro's* analysis. *See Hicks v. Peters*, No. 98C3247 (N.D. Ill. July 18, 1998); *Westenfelder v. Ferguson*, 998 F.Supp. 146 (D. R.I. 1998) (granting preliminary injunction), *appeal docketed*, No. 98-1431 (1st Cir. May 14, 1998); *Ruffin v. Quasim*, No. C97-5767 FDB (W.D. Wash. Feb. 6, 1998) (granting preliminary injunction); *Maldonado v. Houstoun*, 177 F.R.D. 311 (E.D. Pa. 1997) (granting preliminary injunction), *appeal docketed*, No. 98-1893 (3d Cir. Nov. 20, 1997); *Sanchez v. Department of Human Services*, No. A-466-97T1F (N.J. Super. Ct. App. Div. July 8, 1998); *Davis v. Doth*, No. 62-C6-97-010231 (Minn. St. Dist. Ct. July 31, 1998).

It seems likely that these challenges will continue to recur, and the legitimacy of this aspect of welfare reform will remain in doubt, until the Court resolves the issue. The Court should take this opportunity to do so.

II. THE COURT SHOULD TAKE THIS OPPORTUNITY TO REVIEW ITS "RIGHT TO TRAVEL" JURISPRUDENCE, WHICH IS UNSETTLED AND UNSATISFACTORY.

The point of departure for the Court's modern right-to-travel jurisprudence is *Shapiro v. Thompson*, 394 U.S. 618 (1969). In *Shapiro*, the Court considered welfare laws from two States and the District of Columbia, each of which denied welfare benefits to applicants who had not resided within the jurisdiction for at least one year. *Id.*, at 620. The Court first held that

> in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and *any classification which serves to penalize that right*, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.

Id., at 634 (emphasis added). Holding that the provisions in question — which resulted in a complete denial of benefits — did penalize the right to travel, the Court rejected every proffered justification of them, as reflecting governmental interests that were either insufficiently compelling or simply illegitimate. *Id.*, at 627. Accordingly, the Court held that the provisions violated the Fourteenth Amendment's Equal Protection Clause. *Ibid.* The Court emphasized, however, that it was not invalidating waiting-period or residence requirements *per se*. To the contrary, in other contexts:

> [s]uch requirements may promote compelling state interests on the one hand, or, on the other, *may not be penalties* upon the exercise of the constitutional right of interstate travel.

Id., at 638, n.21 (emphasis added). *Accord Memorial Hospital v. Maricopa County*, 415 U.S. 250, 256-57 (1974).

In contrast to its approach in earlier cases involving travel,[3] the Court in *Shapiro* specifically declined to ground its

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[3]For example, the *Passenger Cases*, 7 How. 283 (1849), relied on the Commerce Clause. *Paul v. Virginia*, 8 Wall. 168 (1869), relied on the Privileges and Immunities Clause of Art. IV, § 2. *Twining v. New Jersey*, 211 U.S. 78 (1908), relied on the Privileges and Immunites Clause of the Fourteenth Amendment. *Kent v. Dulles*, 357 U.S. 116 (1958) relied on the Due Process Clause of the Fifth Amendment. *See Shapiro*, 394 U.S. at 630 n.8 (citing these and other (continued...)

analysis upon a constitutional text:

> We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision. It suffices that ... [it] "occupies a position fundamental to the concept of our Federal Union."

Id., at 630, *quoting United States v. Guest*, 383 U.S. 745, 757 (1966). Nor, in shaping the contours of the right it had just asserted, did the Court look to historical practice or legal tradition. To the contrary: while the Court acknowledged that laws to discourage the influx of indigents into a given jurisdiction had been "prevalent" in American and English societies for "centuries,"[4] *Shapiro*, 394 U.S. at 628 n.7, the Court declared that this was a "constitutionally impermissible" purpose. *Id.*, at 631.

In the wake of *Shapiro*, then, much was left unclear: most importantly, the nature and source of the constitutional right to travel, and — flowing from this initial uncertainty — the kinds of laws which might constitute a "penalty" upon the exercise of

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[3](...continued)
cases).

[4]In the *Passenger Cases*, 7 How. 283 (1849), a divided Court struck down state taxes imposed on passengers entering Boston and New York harbors, as violating the Commerce Clause. All of the Justices, however, accepted without question the idea that the States could exclude from their borders paupers and those who were likely to become a public charge. *E.g., id.*, at 406 (McLean, J.); *id.*, at 426 (Wayne, J.); *id.*, at 457 (McKinley, J.); *id.*, at 469 (Taney, C.J., dissenting).

that right, and the nature of the governmental interests which the Court might find compelling enough (or even legitimate) to justify such a "penalty."

Later cases have done little to dispel this uncertainty. By 1986, in the most recent of the Court's right-to-travel decisions, the plurality opinion was still maintaining that "[t]he textual source of the constitutional right to travel ... has proved elusive.... [W]e have not felt impelled to locate this right definitively in any particular constitutional provision," *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (plurality opinion of Brennan, J.), while the dissenting Justices criticized that opinion's reliance on "some free-floating 'right to migrate'...." *Id.*, at 918 (O'Connor, J., dissenting).

> It is unfortunate that the Court has once again failed to articulate and justify by reference to textual sources a single constitutional principle or analysis upon which it can rely in deciding cases such as this.

Id., at 920 (O'Connor, J., dissenting).

This failure in turn has led to the recurrent criticism that *Shapiro's* approach, unbounded by text or tradition, simply cloaks ad hoc value judgments that should properly be left to elected officials. That criticism began with *Shapiro* itself, and has continued. *See, e.g., Shapiro*, at 654 (Warren, C.J., dissenting) ("The era is long past when this Court under the rubric of due process has reviewed the wisdom of ... congressional decision[s]"); *id.*, at 662 (Harlan, J., dissenting) ("I know of nothing which entitles this Court to pick out particular human activities, characterize them as 'fundamental,' and give them added protection...."); *Memorial Hospital v. Maricopa*

County, 415 U.S. at 286 (Rehnquist, J., dissenting) ("the Court should observe its traditional respect for the State's allocation of its limited financial resources rather than unjustifiably imposing its own preferences"); *Attorney General of New York v. Soto-Lopez*, 476 U.S. at 925 (O'Connor, J., dissenting) ("the plurality's right to travel analysis [threatens to] swallow all the traditional deference shown to state economic and social regulation").

Moreover, *Shapiro's* approach has become increasingly out of step with the rest of the Court's jurisprudence. In general doctrinal terms, the Court has often expressed its "reluctan[ce] to expand the concept of substantive due process," *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992), preferring instead to rely wherever possible on specific textual constitutional provisions. *See, e.g., Graham v. Connor*, 490 U.S. 386 (1989) (claim of excessive force by law enforcement officer to be analyzed under Fourth Amendment rather than under substantive due process). And when the Court has resorted to substantive due process, it has "required a 'careful description' of the asserted fundamental liberty interest," and has been guided by "[o]ur Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 117 S.Ct. 2258, 2268 (1997), *quoting Reno v. Flores*, 507 U.S. 292, 302 (1993). Even at the level of specific cases, it is difficult to reconcile the holding of *Shapiro* — that government may not withhold welfare benefits from people who exercise their right to migrate across state lines — with cases such as *Lyng v. Int. Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 485 U.S. 360 (1988) — that government may withhold them from people who exercise their right to strike.

Given all this, it is no surprise that lower courts have frequently expressed difficulty in applying *Shapiro's* analysis to

new situations, and discomfort with its results. *See, e.g., Bethesda Lutheran Homes and Services, Inc. v. Leean*, 122 F.3d 443, 448 (7th Cir. 1997) ("seems odd ... to suppose the ... government constitutionally obligated to provide financial assistance to indigents in a form that will encourage them to seek ... distant states," but nevertheless required by *Shapiro*); *Lutz v. City of York*, 899 F.2d 255, 260-61 (3d Cir. 1990) (seven different constitutional sources have been suggested for the right to travel, but "the Court recently has provided precious little guidance on which of them presently gives rise to a right to travel, and the respective scope of each"); *Westenfelder v. Ferguson*, 998 F.Supp. at 151 nn. 5 & 6, 152 ("precise constitutional source of the right to travel has never been identified," "right-to-travel jurisprudence is somewhat muddled," "[p]recisely what constitutes a 'penalty' is uncertain"); *Maldonado v. Houstoun*, 177 F.R.D. at 323 (right to travel jurisprudence is "fractured," "unsettled and clearly in need of clarification by the ... Court"); *Jones v. Milwaukee County*, 485 N.W.2d 21, 26 & n.4 (Wis. 1992) ("cases addressing durational residency requirements have not clarified the amount of impact necessary to give rise to the compelling state interest standard.... [T]he parameters of *Shapiro's* penalty analysis ... remain undefined").

The Court should review this case, and take this opportunity to clarify the analysis of right-to-travel claims.

CONCLUSION

The Court should grant the petition.

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